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October 1963 Term

No. 501

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DIVISION NO. 892, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR-COACH EMPLOYEES OF AMERICA, Petitioner,

versus

M.K.& O. TRANSIT LINES, INC., Respondent.

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SOUTHERN PTG. — TULSA

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported officially at 319 F. 2d 488, (10th Cir. 1963).

The opinion of the United States District Court for the Northern District of Oklahoma is reported officially at 210 F. Supp. 351 (N.D. Okla. 1962).

QUESTION PRESENTED

Respondent submits that neither of the questions stated by Petitioner is presented in this case. The only question arising out of the disposition of the case by the Court of Appeals which could be presented is whether that court was correct in holding that the contract embodying the agreement to arbitrate the terms of a new contract was terminated.

STATUTORY PROVISION INVOLVED

In addition to that cited by Petitioner, 29 U.S.C., § 158(d), is relevant and is set out in the Appendix, *infra*, p. 1a.

STATEMENT OF THE CASE

Respondent M.K.& O. Transit Lines, Inc., submits the following statement of the case.

On June 24, 1959, Petitioner and Respondent entered into a written collective bargaining contract which set forth wages and general working conditions for a primary term from July 1, 1959, to June 30, 1962, and from year to year thereafter *unless terminated by either party as therein provided.*

On April 27, 1962, pursuant to the terms of the aforesaid contract, and in compliance with the notice requirements of the Labor-Management Relations Act, 29 U.S.C., § 158(d), Petitioner notified Respondent that it desired to negotiate a new contract and further that if a new contract were not agreed upon by midnight, June 30, 1962, the entire contract would then be terminated.[1]

[1] The pertinent part of the letter stated:

> In the event that no agreement has been reached by midnight of June 30, 1962, and if arbitration has not been agreed upon this will also serve due notice that the *entire contract now in effect is to be terminated* as of midnight June 30, 1962." (Emphasis supplied.) (R.13.)

The letter of termination was submitted in accordance with Petitioner's right to so terminate the contract under Article 43 thereof, which provides:

> SECTION 1. This agreement shall be in effect from July 1,

On June 20, 1962, Petitioner requested that its demands for a new contract be determined and fixed by arbitration. Respondent, by letter dated June 25, 1962, rejected the request for arbitration, because, *inter alia*, Petitioner had given notice to terminate the entire contract as of June 30, 1962, in consequence of which the provisions of that contract would no longer be in effect.

On June 29, 1962, Petitioner filed its Complaint in the United States District Court for the Northern District of Oklahoma seeking a judgment of the court to compel Respondent to arbitrate Petitioner's demands for a new contract. Both parties filed motions for summary judgment. On November 8, 1962, the trial court issued its order granting Petitioner's motion for summary judgment and ordering the parties to proceed to arbitration. The court based its order and opinion on the conclusion that as a matter of law and fact the Petitioner could not terminate the contract.[2]

1959 to June 30, 1962, both inclusive, and from year to year thereafter, except that *at the expiration of the contract term* or any renewal thereof *either party may terminate the Agreement* by giving notice to the other party of its intentions to terminate the Agreement or to negotiate changes in its terms. Notice of the intention of either party to terminate the contract or negotiate changes in its terms shall be in writing and be delivered to the other party not more than ninety (90) and not less than sixty (60) days before the expiration of the contract term or any renewal thereof. If such notice is given by either party, it shall also contain an offer to meet and confer with the other party for the purpose of negotiating a new contract." (Emphasis supplied.)

[2] "The Court [Bohanon, J.] . . . they [Union] didn't have any right to terminate it. If you would get together and if you had agreed on termination, why you would be all right, but there was no agreement that you would terminate it. *They [Union] had no more right to terminate it than you [M.K.&O.] did.* You had no

Respondent filed its Notice of Appeal on November 21, 1962, and, upon hearing, the Court of Appeals for the Tenth Circuit entered its judgment on May 31, 1963, reversing the order of the district court. The Court of Appeals decided only one question, to-wit: whether the contract was terminated in accordance with the labor agreement and in accordance with appropriate statutory authority. It held that the letter of April 27, 1962, terminated the Labor Agreement.[3] The court did not reach or decide

more right to terminate it than they did. The letter just — *I don't care what they said in that letter. . . .*" (Emphasis supplied.) (R. 41.)

[3] "While the union now seeks to dismiss the letter of termination as perhaps an indiscreet, but meaningless gesture, no one has questioned that the president of the union who wrote the letter had authority to act for the union pursuant to the contract. Nor can it be questioned reasonably that he did so act to terminate the contract on behalf of the union. The notice was given within the time and in a manner consistent with both the contract of the parties and the Labor-Management Relations Act. There could have been *reasons then valid for* so doing. The union thus could have hoped to avoid the risk of being in the very position it asserts the employer is in now—being bound to arbitrate a future contract as a substitute for the collective bargaining process. Be this as it may, by terminating the contract as it had the right to do, the union relieved itself of the consequences that would have resulted if the collective bargaining agreement had not been terminated. It also relieved the employer of those consequences.

. . . . . .

"The contract, including any obligation to arbitrate new terms and conditions for a renewed period, *was terminated by the union lawfully, in accordance with the expressed intent of the parties and consistently with the Labor Management Relations Act.*" (Emphasis supplied.) (*M.K.& O. Transit Lines, Inc. v. Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America*, 319 F. 2d 488, 491-92 (10th Cir. 1963).)

other questions raised in the trial court and presented on appeal.

REASONS FOR DENYING THE WRIT

THE ONLY QUESTION ARISING FROM THE DECISION OF THE COURT OF APPEALS—WHETHER THE GOVERNING CONTRACT AND THE PROVISIONS EMBODIED THEREIN RELATIVE TO THE ARBITRATION OF A NEW CONTRACT WERE TERMINATED—IS NOT SUCH A QUESTION AS WOULD WARRANT OR SUPPORT THE GRANTING OF A WRIT.

Petitioner asserts that two questions are here presented for review: (1) arbitration of a new collective bargaining agreement is specifically enforceable, and (2) anticipatory repudiation of a collective bargaining agreement does not affect arbitration. Neither of these issues were resolved by the Court of Appeals and are therefore not at issue before this Court. The first of these questions purports to involve the enforceability of an agreement to arbitrate the terms

> "[W]e do not reach the question of the court's authority or jurisdiction to require such arbitration. It may well be on the latter question that the rationale of the decision in the Potter Press case [*Boston Printing Pressmen's Union v. Potter Press*, 141 F. Supp. 553 (Mass. 1956), *aff'd*, 241 F. 2d 287 (1st Cir. 1957), *cert. denied*, 355 U.S. 817 (1957)] should be reappraised in the light of subsequent decisions of the Supreme Court. Our resolution of this important problem, however, should await a case in which it is squarely presented, and it is not squarely presented in this case. *Indeed, it is not presented here at all for the renewable term of the contract in connection with which it might have arisen was foreclosed unequivocally and effectually by the union's notice of termination.*" (Emphasis supplied.) (Footnotes omitted.) (*M.K.&O. Transit Lines, Inc. v. Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America*, 319 F. 2d 488, 490 (10th Cir. 1963).)

of a new contract under Section 301 of the Labor-Management Relations Act.[4] That question was not reached or passed upon by the Court of Appeals because of its determination that the contract had been terminated. That court took cognizance of the Petitioner's contention concerning the question and stated expressly its reasons for not passing upon it.[5]

Respondent therefore respectfully urges that Petitioner's statement that this Court should hear this case in order to resolve the conflicting views of the federal court concerning arbitration of a new contract is erroneous. This issue was not resolved by the Court of Appeals. It does not present an important, well-litigated area of labor law. There is no substantial conflict among the federal courts and no diversity of opinion among the courts of appeals. Certiorari should therefore be denied.

Petitioner's statement of the second question allegedly presented is a patent effort to evade and avoid the Union's unequivocal and effectual notice to terminate. Petitioner here refers to it as an "anticipatory repudiation." Having terminated the contract, as found by the Court of Appeals, all that remains of Petitioner's second question is whether the provisions in respect to the arbitration of the terms of a new contract survived the termination of the entire contract. However, Petitioner does not elsewhere assert or elaborate on this proposition in its Petition. Those cases holding that arbitration clauses in respect to grievances arising during the effective term of the contract survive

[4] 29 U.S.C., § 185(a).

[5] See n.4, p.5.

termination are not relevant to the instant case.[5] The same is true in respect to the statement that the "anticipatory repudiation" was "retracted." There is nothing in the record that raises or presents such a question. In any case the holding of the Court of Appeals ruled upon and disposed of the matter adversely to Petitioner.

The record in the trial court makes it abundantly clear that the trial judge was laboring under the erroneous impression that federal law deprived the contracting parties of the right of either one of them to effect a termination of their contract. *There is no such federal law or federal policy and none has been cited.* It was for this reason that the trial court's decision was reversed, and the Court of Appeals held that Petitioner had terminated the entire contract.

[5] As the Court of Appeals said in reference to this problem:

> "The cases cited by the union to support its claim that the obligation of arbitration survived the notice of termination are not in point. In those cases the sustained arbitration was with reference to accrued though continuing rights under the terminated agreement and did not concern the terms of any new agreement."

* * * * * * *

> "See for example United Steelworkers of America v. Enterprise Wheel & Car Corp., D.C.S.D.W.Va., 168 F.Supp. 508 (1958), modified and remanded, 269 F.2d 327 (4th Cir. 1959), aff'd with modifications, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); and General Tire & Rubber Co. v. Local No. 542, etc., 191 F.Supp. 911 (D.C.R.I. 1961), aff'd 294 F.2d 957 (1st Cir. 1961). Cf. Connecticut Company v. Division 425, etc., 147 Conn. 608, 164 A.2d 415 (1960); *CMK & O Transit Lines, Inc. v. Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America*, 319 F.2d 488, 491 (10th Cir. 1963)."

Obviously Petitioner has now abandoned this position in favor of what is now termed "anticipatory repudiation."

Petitioner now contends that the letter of April 27, 1962,[9] was an "anticipatory repudiation" of the labor agreement between the parties and that the Court of Appeals so determined (Pet. p.10). This contention is false. The issue of "anticipatory repudiation" was not argued by Petitioner or Respondent in either of the two lower courts and was not determined by the Court of Appeals.[9] This belated characterization of the termination letter is nothing more than an attempt to avoid and evade the unequivocal and effectual termination of the agreement found by the Court of Appeals. The instant case involved only an interpretation of Article 43 of the labor agreement,[10] and the Petitioner's letter of termination in accordance therewith.[11]

The Court of Appeals held and decided that the Petitioner had terminated the entire contract in accordance with its letter of April 27, 1962, and in compliance with the rights granted to it by Article 43 of the labor agreement. Even a cursory examination of the opinion by Christensen, D.J., demonstrates that the issue was one of termination and not "anticipatory repudiation." It becomes clear then that

[9] See n 1, pp 2-5.

[9] It was not until the petition for rehearing *en banc* that Petitioner sought to change the issue of *termination* to one of *anticipatory repudiation*. That petition was denied on July 1st, 1965, without opinion. The Court of Appeals noted in this connection and on the record then before it that "the union now seeks to dismiss the letter of termination as perhaps an indiscreet and meaningless gesture." (*M.K.&O. Transit Lines, Inc. v. Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America* 349 F. 2d 488, 491 (10th Cir. 1965).)

[10] See n 1, pp 2-5.

[11] See n 1, pp 2-5.

Petitioner seeks to have this Court resolve an issue which was not determined by, nor for that matter even argued before, the Court of Appeals. It is for this reason that Respondent respectfully takes issue with the Petitioner's statement of questions presented and the unsupported conclusions found in footnote 12, page 11, of the Petition.[12] The Court of Appeals decided only that Petitioner had the right to terminate the contract and in fact did so terminate. The record discloses that no attempt was ever made (assuming that such an attempt would be legally effective) to retract the termination letter.

It thus becomes amply clear that the reliance by Petitioner upon the case of *Drake Bakeries* v. *Local No. 50*, 370 U.S. 254 (1962), is untenable. That case, as Petitioner clearly points out (Pet. pp. 11-12), involved the issue of whether the union had lost its right to arbitrate grievance disputes by breaching a no-strike clause. No issue of termination was

[12] Every case therein cited, with but one exception, involved breach or repudiation of one or more clauses of an agreement during the effective term of the agreement. None involved termination of an agreement on its anniversary date in accordance with an absolute right to terminate granted by the agreement itself. The cases are therefore irrelevant to the decision sought to be reviewed—termination of a collective bargaining contract in accordance with its terms. The case of *Local 181, Int'l Union of Operating Engineers* v. *Dalton Construction Co.*, 195 F.2d 350 (6th Cir. 1952), is also irrelevant because the collective bargaining contract therein provided that *neither party could terminate the agreement* except by executing a new agreement. In addition no notice of termination was given and no issue of arbitration was involved.

The issue of retraction is equally irrelevant since in fact Petitioner and Respondent were required by law to continue to observe the terms of the labor agreement until June 30, 1962 (the termination date), 29 U.S.C. § 158(d). Thereafter the agreement, being terminated, was not observed and no facts in the Record demonstrate otherwise.

there considered or decided by this Court. That being so, the decision of the Court of Appeals in the instant action, by necessity, could not and does not conflict with the decision of this Court in the *Drake Bakeries* case. No authority holds that a labor agreement may not be terminated in accordance with its terms.[13] The cases cited by Petitioner (Pet. pp. 11-12) do not relate to the issue of termination, nor do they relate to the issue of arbitration of the terms and conditions of a new contract. The Petition is misleading because Petitioner has misconceived the question presented in the case and misconstrued the opinion of the Court of Appeals. The Court of Appeals did not ignore the decision in the *Drake Bakeries* case; the case was cited in the brief of Petitioner and argued orally. Had there been a breach of the labor agreement rather than a termination thereof by the moving party, then Petitioner's arguments might have some relevance. As it is, it presents no valid reason for the granting of a writ of certiorari.[14]

This being so, it is respectfully urged that the writ should be denied because there is no conflict with the *Drake Bakeries* case and Petitioner has presented no other reason as to why this Court should review the determination that the labor agreement was terminated in accordance with its terms.

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[13] See: *Oil Workers Int. Union, Loc. No. 463 v. Texoma Natural Gas Co.*, 146 F. 2d 62 (5th Cir. 1945); *System Federation No. 59 of Ry. Employees Dept. of Amer. Federation of Labor v. Louisiana & A. Ry. Co.*, 50 F. Supp. 909 (W.D. La. 1940); *Paterson Parchment Paper Co. v. Int. Brotherhood of Paper Makers*, 191 F. 2d 252 (3d Cir. 1951).

[14] It is interesting to note the Petitioner makes no claim that the issue of termination of the labor agreement should be reviewed by this Court.

Petitioner has tacitly recognized that the normal reasons for the granting of such a petition do not exist in this case.[15] In fact the question of termination relates to this particular contract and the interpretation placed upon Article 43 by the Court of Appeals. The question additionally relates to the meaning and factual surroundings of Petitioner's notice of termination on April 27, 1962. Far from being a fully litigated question of public law, important to large numbers of people, the resolution of this case depends upon this peculiar set of facts.

In addition Petitioner has cited no cases (and indeed it could not have, since none exist) demonstrating a conflict between the circuit courts or between this decision and decisions of this Court relating to termination. It is therefore urged that the Petition be denied.

[15] 28 U.S.C.A. (1962 Supp.) S.Ct. R.19; *Layne & Bowler Corp.* v *Western Well Works*, 261 U.S. 387, 393 (1923); *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949); Hughes, *Address to American Law Institute* (May 10, 1934), 11 A.L.I. Proceedings 313 (1934); Vinson, *Address to American Bar Association* (Sept. 7, 1949), 69 S.Ct. V (1949).

CONCLUSION

For the reasons herein stated, the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted.

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